

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1031 of 1999

in

SPECIAL CIVIL APPLICATION No 5040 of 1999

with

CIVIL APPLICATION NO. 7585 OF 1999

For Approval and Signature:

Hon'ble ACTG.CHIEF JUSTICE MR. C.K.THAKKAR and
MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

BALWANTRAI UMEDRAI BRAHMBHATT

Versus

PALDI KANKREJ SEVA SAHKARI MANDALI LTD

Appearance:

M R K.G.VAKHARIA WITH AVANI S MEHTA for Appellant
MR N.D.NANAVATI WITH MR HARIN RAVAL FOR RESPONDENT 1
MR S. N.SHELAT, ADDL. ADV.GENERAL FOR STATE
AUTHORITIES

CORAM : ACTG.CHIEF JUSTICE MR. C.K.THAKKAR and
MR.JUSTICE K.M.MEHTA

Date of decision: /12/1999

CAV JUDGEMENT

Per Thakker, Actg.C.J.

This appeal is filed against the judgment and order passed by the learned Single Judge in SCA No. 5040 of 1999, on July 24, 1999.

Respondent No.1 was the original petitioner and present appellant was respondent No.4 in that petition. That petition was filed by Paldi Kankrej Seva Sahkari Mandali Limited for an appropriate writ, direction or order quashing and setting aside the decision taken by respondent No.1 Returning Officer and Deputy Collector in including the name of Popatji Khetuji Chauhan, Chairman of the petitioner society as authorised delegate of the petitioner society in place of Balvantbhai Umedbhai Brambhatt (appellant herein) in the final list of voters of Ahmedabad District Cooperative Bank Limited in the constituency of Multi Purpose Agriculture and Seva Sahkari Mandali of Dascroi Taluka constituency.

The case of the petitioner society was that it was a cooperative society registered under the Gujarat Cooperative Societies Act, 1961 (hereinafter referred to as 'the Act'). Election of Board of Directors of Ahmedabad District Cooperative Bank Limited was to be held in accordance with the provisions of the Act and Gujarat Specified Societies (Election to Committee) Rules, 1982. Provisional list of voters was prepared. The Rules provided delegates to be sent for such election. The petitioner society, vide its Resolution No. 2, dated December 21, 1998, appointed Balvantrai Umedbhai Brahmbhatt (appellant herein) as its delegate for participating in the election of Board of Directors of Ahmedabad District Cooperative Bank Limited. Election programme was thereafter declared and as per the said programme, date for publication of provisional list was fixed as June 18, 1988. Last date for lodging objections against provisional list was June 24, 1999 and date for publication of final voters list was July 5, 1999. As per the election programme, blank nomination forms were to be collected between July 15 and 20, 1999 and they were to be duly filed in and submitted between July 21 and July 27, 1999. On July 6, 1999, the petitioner society passed another resolution cancelling its earlier resolution dated December 21, 1998. By the second resolution, one Popatji Khetuji Chauhan was appointed as delegate of the petitioner society in place of Balvantrai Umedbhai Brahmbhatt. According to the petitioner, said

resolution was sent to the Returning Officer, respondent No.1 on July 8, 1999. Balvantrai, however, lodged his objection on July 10, 1999 and contended that he was entitled to be continued as delegate of the petitioner society and he could not be replaced by Popatji Chauhan. The first respondent upheld the objection of Balvantrai and held that Balvantrai was hale and hearty as certified by the medical practitioner and he could not have been replaced by Popatji Chauhan. He, therefore, held that Balvantrai should be continued as delegate of the petitioner society in the ensuing election.

The petitioner, being aggrieved by the above order filed SCA No. 5040 of 1999 for quashing and setting aside the order passed by the first respondent- Returning Officer by directing respondent No.1 to implement the subsequent resolution passed by the petitioner society changing its delegate and allowing Popatji Chauhan to participate on behalf of the petitioner society in the election process.

Petition came up for hearing before the learned Single Judge. At the time of hearing, it was contended on behalf of the petitioner that it was open to the petitioner society in accordance with the provisions of the Act and Rules to change its delegate and such action could not have been interfered with by the first respondent. It was submitted that the only restriction on exercise of right of the petitioner was laced in sub rule (2) of Rule 5 of the Rules which provided that the society had to communicate name of its delegate "upto 6th day before the date appointed by the Collector under Rule 16 for making nomination". As the second resolution was passed and was duly communicated within prescribed time limit, the first respondent had no power, authority or jurisdiction to ignore the said resolution and to prevent the petitioner society from changing its delegate. He could not direct the petitioner society to continue to delegate Balvantrai Brahmbhatt whose name was sent by the society on earlier occasion. The society, by exercising powers in accordance with statutory provisions, could have changed such delegate provided the nomination is sent within stipulated time. The reason which weighed with the first respondent that Balvantrai Brhambhatt was hale and hearty was altogether extraneous, irrelevant and beside the point. A right was conferred on the petitioner society and the first respondent had no authority to curtail right of the society.

On behalf of the respondents, a preliminary objection was raised against maintainability of the petition and it was contended that in the midst of election process, such

petition was not tenable under Article 226 of the Constitution and only course available to the petitioner was to file election petition after the election was over.

Learned Single Judge, however, after hearing the parties and relying upon decision of the Division Bench of this Court in Surendrasinhji Zala vs. Chief Electoral Officer, AIR 1969 Guj. 192 held that in the facts and circumstances of the case, it cannot be said that election process had started. It was a case of pre-election process and it did not fall within four corners of Surendrasinhji Zala and the petition was maintainable. Moreover., even in case of availability of alternative remedy, this Court has extraordinary powers under Article 226 and in exceptional circumstances, this Court can exercise such powers. Learned Single Judge, therefore, overruled the preliminary objection raised by the respondents.

On merits, considering the provisions of the Act as well as Rules, learned Single Judge held that the petitioner society had right to change its delegate in accordance with provisions of the Rules. Rule 5 (2) only provided time limit within which such action can be taken. In the opinion of the learned Single Judge, the action was taken within stipulated period. In para 15, the learned Single Judge observed as under :

"In the facts of this case, the dates for making nominations were 21.7.1999 to 27.7.1999. There may be two views possible on the question whether the sixth day before the date appointed should be counted before the first date appointed for making nominations or before the last day appointed for making nominations. Without expressing any opinion on the said controversy, even if the first day of making nominations is taken as the relevant date, the petitioner society could have communicated the change in the name of its delegate upto 15.7.1999. Admittedly, resolution Nos. 3 and 4 dated 6.7.1999 passed by the petitioner society were communicated to the Returning Officer on 8.7.1999 and the impugned decision of the Returning Officer was rendered on 14.7.1999. In this view of the matter, the Returning Officer could not have refused to accept the request of the petitioner society to change the name of its delegate.,.In the impugned

decision, the Returning Officer stated that the name of ten delegate was changed after 24.6.1999 i.e. after the last date for lodging objections against the provisional list of voters. The ground given by the Returning Officer is irrelevant and flies in the face of the statutory rule permitting the society to change the name of its delegate upto the sixth day before the date appointed for making the nomination."

Accordingly, Rule was made absolute and the petition was allowed.

The present appeal is filed against the above order by original respondent No.4.

We have heard Mr.K.G. Vakharia, senior advocate for Avni Mehta, for the appellant,. Mr. N.D. Nanavati, senior advocate instructed by Mr. Harin Raval for respondent No.1 -original petitioner and Mr. S.N.Shelat, learned Additional Advocate General for the authorities.

Mr. Vakharia contended that the learned Single Judge has committed an error of law and of jurisdiction by entertaining the petition. According to him, as per settled law, the petition in the midst of election process was not maintainable and it ought to have been dismissed by the learned Single Judge only on that ground.

Reliance was placed in this connection on several decisions of the Supreme Court as well as of this Court. He also submitted that the learned Single Judge has not properly interpreted and applied the ratio laid down by the decision of Division Bench in Surendrasinhji Zala. He, therefore, submitted that the order passed by the learned Single Judge on maintainability of the petition was contrary to law and deserves to be set aside.

On merits, Mr.Vakharia submitted that the learned Single judge ought to have considered the order impugned in the petition passed by the first respondent, Returning Officer, that the appellant was hale and hearty. Relying on the decision of learned Single Judge of this Court in SCA No., 4190 of 198 and companion matters decided on June 22, 1998, he submitted that such action would prejudice the entire election process and in exercise of extraordinary jurisdiction under Article 226 of the Constitution, this Court should not interfere with such process. He, therefore, submitted that LPA deserves to

be admitted and interim relief deserves to be granted.

Mr Shelat, learned Additional Advocate General supported Mr. Vakharia. He submitted that the learned Single Judge ought not to have entertained the petition and granted interim relief. The only course open to the petitioner was to wait till election is over and then to file an election petition in accordance with law. He, however, stated that the authorities have not challenged the order passed by the learned Single Judge by filing an appeal.

Mr. Nanavati instructed by Mr. Harin Raval, on the other hand, supported the order passed by the learned Single Judge. He submitted that the learned Single Judge was conscious of the facts and circumstances and exercise of extraordinary powers under Article 226 of the Constitution, interfered with the order. He submitted that the appellant was a delegate of the petitioner society and he had no independent right to participate in the election process. Such right of participation is not conferred on any person but on the society and it is for the society to delegate a member to such election. The rule making authority, in these circumstances, advisedly conferred the power on the society to change its delegate but had put a restriction that it must be done within the stipulated period so that election process may not be delayed. He, therefore, submitted that if within stipulated period, action was taken by the society and delegate was changed, the appellant could not make any grievance. In fact, he had no right to file an appeal. He also submitted that the reason which weighed with the first respondent Returning Officer that the appellant was hale and hearty was altogether irrelevant and extraneous and it was not within the jurisdiction of the Returning Officer to enter into that question. When a right is conferred on the society to delegate its member, the first respondent could not interfere with that right on the so called ground that the appellant was hale and hearty and could not have been substituted by another member. That order was, therefore, wholly without jurisdiction and the learned Single Judge, in the facts and circumstances, rightly interfered with the same by allowing the petition.

Mr. Nanavati further submitted that as on today, when the appeal is heard by a Division Bench, everything is over and in accordance with the directions issued by the learned Single Judge, final list of voters is prepared and election process has thereafter started. He, therefore, submitted that even as per the argument of the

learned advocate for the appellant and supported by the learned Additional Advocate General , at the time of hearing of the appeal, no relief can be granted in favour of the appellant.

In the facts and circumstances of the case, in our opinion, no ground is made out by the appellant to interfere with the order passed by the learned single Judge. So far as the maintainability of the petition is concerned, it cannot be gainsaid that ordinarily, in exercise of extraordinary jurisdiction under Article 226 of the Constitution, this Court does not entertain a petition when alternative and efficacious remedy is available to the aggrieved party. But it is a matter of discretion and not of jurisdiction of the Court. In exceptional cases, inspite of alternative remedy being available, a High Court may interfere with such orders against which alternative remedy is available provided it is satisfied that such interference is necessary. In the instant case, the learned Single Judge has observed that the society could nominate its delegate and accordingly, by a resolution, the present appellant was nominated. But then, by a subsequent resolution, a decision was taken to nominate the petitioner in place of the present appellant and such action cannot be said to be illegal or contrary to law. moreover, the first respondent Returning Officer observed that the present appellant was hale and hearty. The learned Single Judge, in our opinion, was right in observing that such fact was not relevant and germane in deciding the right of the petitioner society in changing the delegate. Either the right is there or is not there. When such right exists, it could have been exercised at any stage within the period prescribed under the rules. When the said right was exercised within the prescribed period of six days, the Returning Officer had no authority to interfere with it. Accordingly, the learned Single Judge allowed the petition and we find no infirmity therein.

For the foregoing reasons, in our opinion, no fault can be found with the order passed by the learned Single Judge. We see no infirmity in the reasoning of the learned Single Judge. LPA , therefore, deserves to be dismissed and is accordingly dismissed. In the facts and circumstances of the case, there shall be no order as to costs. No order on civil application.

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